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Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

NELSON EDGAR EMMENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Customs agents' warrantless search of petitioner's airplane, which had taxied into a private hangar within the curtilage of petitioner's house after crossing the United States border, violated the Fourth Amendment.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-21) is reported at 893 F.2d 1292. The orders of the district court (Pet. App. 3-7, 8-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1990. The petition for a writ of certiorari was filed on May 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional guilty plea in the United States District Court for the Southern District of Florida,

petitioner was convicted of importing at least five kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1). He was sentenced to a term of 210 months' imprisonment, to be followed by a five-year term of supervised release. He was also ordered to pay a \$150,000 fine. The court of appeals affirmed.

1. Petitioner was the subject of a lengthy criminal investigation conducted by the United States Customs Service, the Drug Enforcement Administration, and the Internal Revenue Service. Petitioner, a pilot who lived next to a private airstrip in Delray Beach, Florida, was suspected of smuggling narcotics into this country. In early May 1988, federal authorities learned from several confidential sources that petitioner would be flying a load of cocaine from Colombia to either Florida or the Bahamas. By May 11, federal agents had received sufficient additional information to track petitioner's flight and intercept him. Pet. App. 3-4; Tr. 46-47.¹

The agents learned that petitioner, flying a Piper Aztec airplane, would be landing in southern Florida on the evening of May 11. According to the agents' informants, petitioner would land either at the Antiquers Field in Delray Beach near his house, or at a deserted spot near Lake Wales. Pet. App. 4; Tr. 48-51. In the early afternoon of May 11, the DEA received word that petitioner was heading back from Colombia and was flying over the Gulf of Mexico. The DEA alerted the Customs Service, which dispatched a radar plane to the Gulf to track petitioner. The Customs Service also sent a helicopter carrying a team of agents to the Delray Beach area in order to intercept petitioner after he landed. Pet. App. 4, 17; Tr. 52-53.²

¹ "Tr." refers to the transcript of the suppression hearing held on July 21, 1988.

² By this time, the authorities anticipated that petitioner would be landing at the airstrip next to his house. A team of agents therefore

In the late afternoon, a Customs Service radar plane detected petitioner's plane flying over the Gulf of Mexico. The plane, traveling north and then due east toward southern Florida, was flying at a low altitude. The plane was not sending a transponder signal to identify itself, and it occasionally deviated from its flight path, apparently in order to check for any surveillance. The Customs Service also tracked another plane in the vicinity, which appeared to be acting as a look-out for petitioner. Pet. App. 4, 17; Tr. 5-6, 62-63.

Petitioner's plane crossed the United States border at Naples, Florida. A second Customs Service radar plane was following petitioner and was in contact with the intercept helicopter and the agents on the ground. At approximately 8 p.m., petitioner approached the airstrip at Antiquers Field in Delray Beach; the radar plane alerted the helicopter and directed it to land immediately after petitioner in order to intercept him. The radar plane watched as petitioner's plane landed and taxied into a private hangar near a house. The radar plane relayed that information to the helicopter, which landed shortly afterward. Pet. App. 4; Tr. 7-8, 55-56.

When the helicopter landed, petitioner's plane was parked inside the hangar, and the hangar door was closing. Customs agents, wearing identifying jackets and carrying weapons, fanned out from the helicopter and approached the hangar. Customs Special Agent Gary Pior, the lead agent, spotted petitioner standing inside the hangar at the rear of the plane. When petitioner saw the agents, he immediately dropped to the ground and lay spread-eagle. Agent Pior ran up to petitioner, who was lying across the threshold of the hangar, in order to stop the hangar door from closing on petitioner's legs. Pet. App. 4; Tr. 10-11.

assembled at a nearby shopping center to await further instructions. Tr. 54.

Pior detained petitioner and, through the partially open hangar door, noticed that there appeared to be two figures in the back seat of the airplane. Pior and other agents then entered the hangar "to make sure that there was no one else around." Tr. 12. As Pior explained, "[i]t was a precautionary sweep of the area, to make sure that our safety and the safety of [petitioner] was utmost." Tr. 12.³ As Pior approached the plane, he noticed that the plane bore taped, altered tail numbers. Pior also realized that the two figures he had seen were actually mannequins of Prince Charles and Princess Diana; the mannequins were propped up on a pile of duffel bags. The agents found no other persons inside the hangar. Pet. App. 4-5; Tr. 13-15.

Pior tried to open the plane's door, but it was locked. Pior then asked petitioner for the key and took it from him. Inside the plane, Pior discovered 12 duffel bags and an extra fuel tank. He opened one of the duffel bags and found individually wrapped packages that appeared to contain narcotics. Pior had petitioner placed under arrest; Pior then conducted a field test of the contents of one of the packages. The contents tested positive for cocaine. The agents then seized the airplane and its contents and secured the area. Pet. App. 4-5, 18; Tr. 16-19, 34-37.⁴

³ The hangar was about 60 feet from petitioner's house, which occupied a 2.2-acre lot in Antiquers Field, a private residential community. Residents shared a centrally located grass airstrip. Petitioner's property "was enclosed on three sides by a hedge; the fourth side abutted the grass airstrip." Pet. App. 17. A walkway and driveway connected petitioner's hangar to his house. The hangar contained "a place for parking [an] airplane, a three-car garage, a small workshop, and a small office." *Ibid.*

The agents made only a cursory, protective sweep search of the hangar, not a full-scale evidentiary search. Pet. App. 4-5, 18.

⁴ The government later determined that petitioner's plane was carrying approximately 300 kilograms of cocaine.

2. Petitioner filed a pretrial motion to suppress the seized cocaine. He contended that the agents' warrantless search of his plane, which was located within his hangar on private property, violated the Fourth Amendment. After an evidentiary hearing, the district court denied that motion in August 1988. Pet. App. 3-7. The court noted that "[b]order searches constitute a well-known exception to the mandate of the fourth amendment." *Id.* at 6 (internal quotation marks omitted). And the court further recognized that "a particular *search* may be the functional equivalent of a search at the border if the object of the search has been kept under constant surveillance from the border to the point of search." *Ibid.* (internal quotation marks omitted).

Here, the court "assum[ed] * * * that [petitioner] had a legitimate expectation of privacy in the airplane hangar." Pet. App. 6. Nevertheless, the court found that it was

undisputed that the aircraft entered the United States without declaring itself [and that] [t]he aircraft had been constantly surveilled since it was located over the Gulf of Mexico until it landed in Delray Beach, Florida.

Ibid. Accordingly, the court held that "[t]he mere fact that a border entry had been made makes the search reasonable." *Ibid.*⁵

3. The court of appeals affirmed. Pet. App. 15-21. In the court of appeals, petitioner did not dispute that, if the agents had searched the plane before it reached his private hangar, the border search doctrine would have rendered the search constitutional. Instead, petitioner principally contended that that doctrine did not apply to the search at issue

⁵ On petitioner's motion for reconsideration, the district court reopened the record to receive additional evidence regarding the location and function of the private hangar. After considering that evidence, see note 3, *supra*, the district court again denied petitioner's motion to suppress. Pet. App. 8-9.

since it took place within the curtilage of his house. Pet. C.A. Br. 12-16; Pet. C.A. Reply Br. 1-3.

The court of appeals recognized that "neither a warrant nor any level of suspicion is required to search vehicles, including aircraft, arriving in the United States." Pet. App. 19. The court pointed out that

"[a] border search may be conducted away from the actual border if: (1) there is a reasonable certainty that the object of the search has just crossed the border, (2) the search takes place at the first practicable point after the border was crossed, and (3) there has been no time or opportunity for the object of the search to have changed materially since the time of the crossing."

Ibid. (quoting *United States v. Carter*, 760 F.2d 1568, 1576 (11th Cir. 1985)). Here, as petitioner conceded, those three requirements were met. Accordingly, the court concluded that "the warrantless search of [petitioner's] plane was justified as a search at the functional equivalent of the border." Pet. App. 18.

In so holding, the court rejected petitioner's contention that "because the airplane * * * reached an area located within the curtilage of [his] home * * *, Customs was prohibited from searching the plane without a warrant." Pet. App. 19. Like the district court, the court of appeals "[a]ssum[ed] the hangar was actually part of the curtilage of [petitioner's] home." *Ibid.* The court recognized, however, that "[a] dwelling, together with its surrounding curtilage, is not always a sanctuary from law enforcement activity, even if the police act without a warrant." *Id.* at 21. The court therefore "refuse[d] to allow [petitioner] to cross the border in an airplane and then to thwart Customs' lawful right to search that airplane at the first practicable point by his parking the plane in a private place." *Ibid.* In the court's view, "[t]o hold otherwise would be to force

Customs agents to play 'tag' with suspected smugglers." *Ibid.* The court accordingly held that

Customs' warrantless search of an airplane inside the curtilage of the suspect's home is a lawful search if all other requirements for a valid search of that plane at the functional equivalent of the border are satisfied, including the requirement that there has been no opportunity for the object of the search to have changed materially since the time of the border crossing.

Ibid.

ARGUMENT

1. Petitioner contends (Pet. 6-11) that the Fourth Amendment prohibited the Customs agents from conducting a warrantless search of his airplane after he flew it across the border because, at the time of the search, the plane was parked in a hangar within the curtilage of his home. As this Court recently reiterated, "the Fourth Amendment bars only unreasonable searches and seizures." *Maryland v. Buie*, 110 S. Ct. 1093, 1096 (1990). "What is reasonable," the Court has stated, "'depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). Accordingly, "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 1414 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

Consistent with "Congress' power to protect the Nation by stopping and examining persons entering this country," the Court has long recognized that "the Fourth Amend-

ment's balance of reasonableness is qualitatively different at the international border than in the interior." *United States v. Montoya de Hernandez*, 473 U.S. at 538. Consequently, the Fourth Amendment does not prohibit routine searches at the border, even in the absence of a warrant or any particular level of suspicion. See, e.g., *United States v. Ramsey*, 431 U.S. 606, 616-619 (1977); *Carroll v. United States*, 267 U.S. 132, 153-154 (1925); *Boyd v. United States*, 116 U.S. 616, 623 (1886). Moreover, the so-called "border search" doctrine applies to searches conducted at the "functional equivalent" of the border. E.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-273 (1973). As the Court has explained, "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. at 616.⁶

Here, petitioner "concedes that the facts presented constitute a search at the functional equivalent of the border." Pet. 6. The record showed that "Customs [agents] continuously tracked [petitioner's] plane as it flew over the ocean and crossed the United States border" and that "[a]s soon as [petitioner] parked the plane, Customs [agents] stopped [him] and conducted the search." Pet. App. 20. As the court of appeals explained, the Customs agents conducted the search at the first practicable point after the border was crossed, for they "allowed [petitioner] only enough time to park the plane in the hangar to prevent [him] from flying away and escaping." *Ibid*.

⁶ Indeed, the Court has recently acknowledged that the "longstanding concern for the protection of the integrity of the border * * * is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *United States v. Montoya de Hernandez*, 473 U.S. at 538.

Contrary to petitioner's submission, the fact that the agents' search took place within the curtilage of petitioner's house does not render the warrantless search "unreasonable." As petitioner correctly points out, the Fourth Amendment generally prohibits warrantless searches of houses, including the area within the curtilage, in the absence of exigent circumstances. See, e.g., *United States v. Dunn*, 480 U.S. 294, 300-301 (1987); *Oliver v. United States*, 466 U.S. 170, 178 (1984); *Payton v. New York*, 445 U.S. 573, 585-586 (1980). Such searches, the Court has recognized, are "presumptively unreasonable." *Payton v. New York*, 445 U.S. at 586; see also *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475 (1971).

The particular search at issue here—the search of an airplane at the first practicable point after it had crossed the border—is not the sort of "presumptively unreasonable" search the Fourth Amendment categorically condemns. To the contrary, this Court has long held that such warrantless searches are "considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *United States v. Ramsey*, 431 U.S. at 619. The fact that petitioner managed to park his airplane within the curtilage of his house before the authorities arrived on the scene should not alter that assessment. Persons who enter the country at the border certainly know that they are subject to searches and inspections conducted by the Customs Service. Moreover, the reasonableness of the particular search in this case is buttressed by the fact that the Customs agents had probable cause to believe that the plane was carrying cocaine—a point petitioner does not dispute. And even outside the context of a border search, a suspect cannot defeat the right of police officers to arrest and search him by retreating from a public place into a private home while the officers are in hot pursuit. See *United States v. Santana*, 427 U.S. 38 (1976).

On the record presented, the court of appeals therefore correctly held that the agents' warrantless search of petitioner's plane was "reasonable" under the Fourth Amendment. And since this case, as petitioner points out, appears to present an "issue of first impression," Pet. 6, and involves an unusual set of circumstances not likely to recur with any frequency, further review is not warranted.

2. In any event, this case is not a suitable vehicle for resolving the issue petitioner presents since the agents' warrantless search may also be upheld on an alternative ground. By the time petitioner's plane landed in Delray Beach, the investigating agents had probable cause to arrest petitioner on narcotics smuggling charges. Petitioner's flight pattern over the Gulf of Mexico corroborated the confidential informants' information about petitioner's smuggling activities, and the appearance of a second "counter-surveillance" plane suggested that petitioner was in fact carrying a load of contraband. Although Agent Pior, the arresting officer, had no personal knowledge of these facts, he was under orders, from the Customs and DEA agents conducting the investigation, to intercept petitioner on the ground. Cf. *Whiteley v. Warden*, 401 U.S. 560, 568 (1971); see 2 W. LaFare, *Search and Seizure* § 3.5(b) (1987). In these circumstances, petitioner was subject to lawful arrest when Agent Pior found him lying across the threshold of the hangar. See *United States v. Santana*, 427 U.S. at 42-43.

Once petitioner was in custody, the agents on the scene were entitled to enter the hangar to conduct a cursory, protective sweep—a point petitioner does not dispute. See Pet. 9. Before entering the hangar, Agent Pior noticed two figures that appeared to be sitting inside the plane. That fact alone justified the agents in entering the hangar to ensure that there were no other potentially dangerous individuals on the premises. See *Maryland v. Buie*, 110 S. Ct. at 1098. Once legitimately inside the hangar, Agent Pior

saw that petitioner's plane bore altered tail numbers, a tell-tale sign of smuggling activity, and that it contained two mannequins propped up on duffel bags. These facts, taken together with petitioner's behavior on the scene, provided sufficient probable cause for Agent Pior to believe that the plane was carrying contraband. Accordingly, under the exception to the Warrant Clause applicable to moveable vehicles such as cars and planes, Pior was entitled to search the plane without first obtaining a warrant. See *Michigan v. Thomas*, 458 U.S. 259, 261-262 (1982); *United States v. Rollins*, 699 F.2d 530, 534 (11th Cir.), cert. denied, 464 U.S. 933 (1983); *United States v. Brennan*, 538 F.2d 711, 721-722 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977). Since the cocaine was discovered during a lawful search of petitioner's plane, it was not subject to suppression.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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